89-11

No. _____

Supreme Court, U.S.
FILED
JUL 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1988

ANTHONY DURKAN,

*Petitioner,*

v.

DEPARTMENT OF AGRICULTURE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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July 3, 1989

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure of the Merit Systems Protection Board to recognize inconsistencies between the written records of the Department of Agriculture and the testimony of the sole witness and admitted criminal against Petitioner, a 19 year government employee, recognized by the Agency for his long history of loyal and honest hard work, was arbitrary, capricious and an abuse of discretion?

2. Whether the Merit Systems Protection Board's credibility determination as to the sole witness and admitted criminal against the Petitioner was supported by substantial evidence?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit in *Durkan v. Department of Agriculture,* Docket No. 88-3389, was decided April 4, 1989 and is unpublished. App. 20.

The Response to Petition for Review of the Merit Systems Protection Board in *In the Matter of Anthony Durkan v. Department of Agriculture Food Safety and Inspection Service,* Docket No. BN07 528810002 was decided on March 11, 1988 and is unpublished. App. 18.

The Initial Decision of the Merit Systems Protection Board, Boston Regional Office in *Durkan v. Department of Agriculture*, Docket No. BN07 528810002 was decided January 13, 1988 and is unpublished. App. 1.

## JURISDICTION

The majority and dissenting decision of the United States Court of Appeals for the Federal Circuit was entered on April 4, 1989. Jurisdiction in the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND REGULATIONS

The Civil Service Reform Act, 5 U.S.C. § 7701(a), (b), (c) and (e)(1):

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right –
>
> (1) to a hearing for which a transcript will be kept; and
>
> (2) to be represented by an attorney or other representative.
>
> Appeals shall be processed in accordance with regulations prescribed by the Board.
>
> (b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title [5 USCS § 3105] or other employee of the Board designated by

the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision –

(A) in the case of an action based on unacceptable performance described in section 4303 of this title [5 USCS § 4303], is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment –

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title [5 USCS § 2302(b)];

(C) shows that the decision was not in accordance with law.

* * *

(e)(1) Except as provided in section 7702 of this title [5 USCS § 7702], any decision under subsection (b) of this section shall be final unless-

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Civil Service Reform Act, 5 U.S.C. § 7703(a), (b)(1) and (c):

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701 [5 USCS § 7701]. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

* * *

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be –

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

5 C.F.R. § 1201.56(a)(1), (c)(1) and (2):

Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof.* (1) Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the Board if:

(i) It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence; or

(ii) It is brought under any other provisions of law or regulation and is supported by a preponderance of the evidence.

* * *

(c) Definitions. For purposes of this part, the following definitions shall apply:

(1) Substantial evidence: That degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(2) Preponderance of the evidence: That degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

## STATEMENT OF THE CASE

### Procedural History and Nature of The Case

The Department of Agriculture (hereinafter "Agency") removed Petitioner Anthony Durkan from his position as a food inspector, GS-9, effective October 9, 1987, based on uncorroborated allegations that he accepted $300.00 every Friday between October 5, 1980 and December 24, 1980 from the L.B. Darling Company of Southboro, Massachusetts in return for overlooking the Company's action in adulterating meat.

Petitioner timely appealed his removal to the Merit Systems Protection Board (hereinafter "MSPB"). 5 U.S.C. § 7701(b). The appeal was referred to an Administrative Law Judge (hereinafter "ALJ"). 5 U.S.C. § 7701(b). The ALJ upheld Petitioner's removal by the Agency in her Initial Decision entered on January 13, 1988 based on her determination that the Agency had proved its case by a preponderance of the evidence.

Full MSPB review pursuant to 5 U.S.C. § 7701(e) was then requested by Petitioner. The MSPB response to the Petition for Review, dated March 11, 1988, likewise upheld the ALJ's affirmance of the Agency's decision.

A timely appeal of the MSPB decision to the United States Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. § 7703(b)(1) was filed by Petitioner. The appeal was based on the failure of the MSPB Administrative Judge to make a determination regarding Mr. White's testimony which was supported by substantial evidence. Further, the Petitioner claimed, as he does before this Court, that the Administrative Judge's affirmance of the

Agency determination was arbitrary and capricious and therefore constituted an abuse of discretion.

The Appeal was heard by three judges of the Federal Circuit Court. Circuit Judges Rich and Archer upheld the MSPB decision. Senior Circuit Judge Baldwin dissented from the majority opinion, recommending reversal and reinstatement of the Petitioner.

**Facts**

Petitioner Anthony Durkan began his employment with the Agency in 1968. During his 19 years of service with the Agency, Petitioner distinguished himself as an honest, hard working, dedicated employee, and was recognized by the Agency as such. On April 22, 1981, the Agency awarded Petitioner a commendation for the superior manner in which he performed his duties as a food inspector during the period in which he is now alleged to be guilty of improper conduct.

The affirmance of the Agency decision to terminate Petitioner was based on the testimony of one Mr. David White. Mr. White testified on behalf of the Agency during the Initial Decision proceeding before the MSPB Administrative Law Judge. His testimony was the sole evidence presented by the Agency to support the charges against Petitioner.

As the MSPB Initial Decision noted, the critical issue in this case is one of credibility. The Agency presented only Mr. White's testimony to corroborate its charges against Petitioner. There was no extrinsic evidence to

support Mr. White's testimony. In fact, the extrinsic evidence directly contradicted Mr. White's unsupported testimony.

Mr. White testified that he paid $300.00 per week to Petitioner every Friday from the beginning of October 1980 through December of 1980; $3,900.00 over 13 weeks. The alleged purpose of the supposed bribe was to persuade Petitioner to "look the other way" as to L.B. Darling's adulteration of meat. The Administrative Judge acknowledged that Petitioner was not at L.B. Darling's plant in Southboro, Massachusetts for at least 5 of the 13 Fridays in question based on the Agency's employment records, but concluded it was irrelevant.

> I do not find that appellant's testimony and documentary evidence showing that he was not at L.B. Darling on every Friday between October 1, 1980 and the end of December 1980, contradicting Mr. White's testimony that he paid appellant on Fridays during those months, is conclusive on the issue of whether appellant accepted the bribes. The agency did not charge that appellant accepted a specific amount of money nor that he accepted money on every Friday in October, November, and December 1980. The fact that appellant may not have been at L.B. Darling on five Fridays during those months and that he did not socialize with Mr. White after work on at least two other Fridays during that time period does not show that he did not accept bribes on the other Fridays he was at L.B. Darling.

Initial Decision, *supra*, at p. 11; App. 11.

The MSPB Administrative Judge expressly stated in her Initial Decision that she found Mr. White's testimony more credible than Petitioner's testimony based on fac-

tors *other than* demeanor.[1] These factors included her summary dismissal of evidence in the Agency's own written records contradicting Mr. White's testimony, inclusion of Petitioner in an eleven-count criminal information as an unindicted co-conspirator, guilty pleas of other parties in other cases and Mr. White's plea agreement.

## ARGUMENT

### I. THE FEDERAL CIRCUIT'S MAJORITY DECISION IN *DURKAN V. DEPARTMENT OF AGRICULTURE* SANCTIONED THE DEPARTURE BY THE MERIT SYSTEMS PROTECTION BOARD FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BECAUSE THE RECORD AS A WHOLE IN *ANTHONY DURKAN V. DEPARTMENT OF AGRICULTURE*, MERIT SYSTEMS PROTECTION BOARD, DOCKET NO. BN 0752 8810002 (JULY 8, 1988) LACKED SUBSTANTIAL EVIDENCE SUPPORTING THE ADMINISTRATIVE JUDGE'S CONCLUSIONS AND THE MSPB'S ACTION IN UPHOLDING THE AGENCY TERMINATION OF PETITIONER WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION.

The decision below sanctioned the departure by the Merit Systems Protection Board from the accepted and

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[1] I found nothing in either witness's demeanor that helped me a great deal in resolving the credibility issue. Both witnesses testified in a straight forward manner and looked me straight in the eye when they testified. I found nothing in their facial expression or general manner that indicated that one was being untruthful. Neither witness was nervous or appeared that he was trying to hide anything.

Initial Decision, *supra*, p. 12; App. 11-12.

usual course of judicial proceedings. The record as a whole below before the MSPB lacked substantial evidence to support the Administrative Judge's conclusion and affirmance of the Agency's termination of Petitioner. Further, the MSPB affirmance was arbitrary, capricious and an abuse of discretion. Thus, the affirmance by the MSPB, and the Federal Circuit's sanctioning of such, warrants review by Writ of Certiorari by this Court as both constitute obvious and exceptional error.

### A. THE ARBITRARY AND CAPRICIOUS ACTION OF THE MSPB VIOLATED THE VERY PURPOSES OF THE CIVIL SERVICE REFORM ACT OF 1978 BECAUSE THE AGENCY DETERMINATION WAS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

The Civil Service Reform Act of 1978 added, *inter alia*, 5 U.S.C. § 7701(c). Congress enacted the Civil Service Reform Act to deal with inefficiencies created by antiquated management practices within the federal employment system. *Weiss v. United States Postal Service*, 700 F.2d 754, 758 (1st Cir. 1983), quoting S.Rep. No. 95-969, 95th Cong., 2d Sess. 3, *reprinted in* [1978] U.S. Code Cong. and Ad.News 2723, 2725 (quoting from Final Staff Report). The reform had two intended objectives: "increas[ing] the procedural protections afforded employees, while also protecting the right of agencies to be able to maintain the most efficient workforce possible . . . ." S.Rep. No. 95-969, 95th Cong., 2d Sess. 3, 46, *reprinted in* [1978] U.S. Code Cong. and Ad.News 2723, 2768 (quoting from Final Staff Report). The MSPB is the sole system of appeal for a federal employee covered by the system. *Del Gizzo v.*

*United States Postal Service*, 575 F.Supp. 822, 823 (D.N.J. 1983)(citation and internal quotation marks omitted).

An appeal from an administrative agency by an employee may be heard by the full board or referred to an ALJ. 5 U.S.C. § 7701(b). The purpose of this provision is to assure the employee a "full evidentiary hearing in any case where there is a dispute as to any genuine and material issue of fact . . . ." *Curran v. Department of Treasury*, 714 F.2d 913, 915 (9th Cir. 1983), quoting S.Rep. No. 969, 9th Cong., 2d Sess. 54, *reprinted in* 1978 U.S. Code Cong. and Ad.News 2723, 2776. Under 5 U.S.C. § 7701(e), the ALJ's decision becomes the final order of the MSPB unless it is appealed to the full MSPB. In reviewing an appealed case, the MSPB is entitled to substitute its judgment for that of the ALJ. *Curran*, 714 F.2d at 915, citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492, 71 S.Ct. 456, 467, 95 L.Ed. 456 (1951); *McDonough v. Postal Service*, 666 F.2d 647, 648 n.1 (1st Cir. 1981).

In reviewing an agency determination, the decision shall be sustained by the MSPB *only* if it is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B).

> Preponderance of the evidence, with respect to the burden of proof in civil or administrative actions such as this one, means the greater weight of the evidence, evidence which is more convincing than the evidence which is offered in opposition to it. A preponderance of the evidence is specifically defined in 5 CFR 1201.56(c)(2) as:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

*Hale v. Department of Transportation, Federal Aviation Administration*, 772 F.2d 882, 885 (Fed. Cir. 1985).

1. Mr. White's Testimony Was Contradicted By the Agency's Own Records.

The only evidence presented against Petitioner was the testimony of Mr. White. He testified that every Friday for 13 weeks in 1980 he gave Petitioner $300.00 to not perform his responsibilities as a federal meat inspector at the L.B. Darling Co. in Southboro, Massachusetts. Petitioner contradicted Mr. White with his own testimony *which was corroborated by the Agency's own records.*

Mr. White's testimony was completely unsubstantiated. The Agency's own records impugned Mr. White's credibility. Yet, the ALJ and the full MSPB casually dismissed these inconsistencies.

2. MSPB Improperly Relied On Inclusion Of Petitioner In An 11-Count Criminal Information As An Unindicted Coconspirator, Guilty Pleas In Other Cases, And Mr. White's Plea Agreement.

After casually dismissing the blatant inconsistencies between Mr. White's testimony and the Agency records, the ALJ improperly relied on allegations that the vice-president of L.B. Darling Co. and two federal meat inspectors were served with an 11-count Criminal Information charging them with participation in a fraud and bribery scheme from 1978 to 1985[2] and that Petitioner's

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[2] Petitioner's attorney objected to John Jones's testimony regarding the 11-count indictment of L.B. Darling Company's vice-president and a federal meat inspector. This objection was sustained by the Administrative Judge.

name was mentioned in the 11-count Criminal Information as an unindicted coconspirator.[3] These factors had no rational basis for her finding that the sole prosecution witness and admitted criminal and coconspirator was more credible than the Petitioner, a decorated 19 year employee of the Agency.

A grand jury lacks the power to accuse a person of a crime without indicting that person. As a consequence, courts expunge references to named unindicted coconspirators. *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975); *Deplit v. Beckner*, 481 F.Supp. 42 (M.D.La. 1979); *United States v. DePalma*, 461 F.Supp. 778 (S.D.N.Y. 1978).

Petitioner was never given an opportunity to refute the allegations contained in the Criminal Information. Yet the MSPB improperly used that information to bolster the credibility of Mr. White.

The ALJ also improperly relied on evidence that the vice-president and one other federal meat inspector had pled guilty to similar charges when considering the issue of credibility.

> I find that Mr. White's version of events is more credible than appellant's. I base this finding on several factors. Firstly, there is no dispute that bribery occurred at the L.B. Darling Company as the vice-president of the company and one federal meat inspector pled guilty to the charges. Mr. White provided the testimony that led to these indictments and guilty pleas.

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[3] Petitioner's attorney objected to John Jones' testimony regarding the inclusion of the Petitioner's name as an unindicted coconspirator. The objection was sustained by the Administrative Judge.

Initial Decision, *supra*, pp. 7-8; App. 7-8.

A finding that David White was testifying truthfully in this instance because his testimony led to guilty pleas by disparate parties is arbitrary, capricious, and an abuse of discretion. While this issue has arisen only in the criminal context, the deprivation facing the Petitioner in this instance, loss of 19 years of service with the Agency, and the impact on his reputation, should require that he be afforded at *least* the same protections as a criminal defendant.

> Introduction of [a coconspirator's] guilt violated two of the most basic tenets of our criminal jurisprudence. First, the evidence against an accused must come from the witness stand in open court so that a defendant may confront his accusers. A verdict of guilt must be based on the evidence developed at the defendant's trial, not the evidence developed at some other defendant's trial. By taking judicial notice of [the coconspirator's] adjudication and reading [his] indictment to the jury, the trial court effectively barred [defendant's] counsel from examining either the evidence at [the coconspirator's] trial or, alternatively, the motives behind a plea. Second, guilt or innocence must be determined one defendant at a time without regard to the disposition of charges against others. In a conspiracy trial, which by definition contemplates two or more culpable parties, courts must be especially vigilant to ensure that defendants are not convicted on the theory that guilty birds of a feather are flocked together.

*United States v. Griffin*, 778 F.2d 707, 711 (11th Cir. 1985)(internal citations and quotations omitted). *See, also, United States v. Austin*, 786 F.2d 986, 991 (10th Cir. 1986)("A codefendant's guilty plea may not be used as substantive evidence of a defendant's guilt. Due to the

extreme and unfair prejudice suffered by codefendants in similar situations, courts and prosecutors generally are forbidden from mentioning that a codefendant has either pled guilty or been convicted . . . . These general rules apply to coconspirators as well as to codefendants.")(citations omitted).

Finally, the administrative judge inappropriately relied on Mr. White's plea agreement to assess his credibility.

> Mr. White was given immunity from criminal prosecution. He testified that he knew he had to tell the truth if given immunity or else he would suffer serious consequences.

Initial Decision, *supra*, p. 8; App. 8.

Courts have characterized such reliance on a requirement of truthfulness in a plea agreement as impermissible vouching when used by prosecutors to bolster the credibility of their witnesses. The rationale for such holdings is that the government has implied that it is forcing the truth from the witness and that the truthfulness of his statements is therefore assured. *United States v. Brown*, 720 F.2d 1059 (9th Cir. 1981); *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980), *aff'd* 640 F.2d 225, *cert. denied*, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981).

Here the ALJ used the plea agreement for the very purpose for which courts have excluded it: Mr. White has promised to tell the truth in exchange for immunity and he must therefore be telling the truth. This circular reasoning is particularly unpersuasive where it is used to circumvent the inconsistencies between a witness's statements and undisputed documentary evidence.

The MSPB also ignored the negative impact immunity may have on the credibility of a witness. Mr. White has nothing to lose by his testimony. No one has knowledge of his alleged disbursements so as to recognize if he is prone to mendacity. At the same time, he is gaining immunity from prosecution for the very acts as to which he testifies.

As a result, Petitioner was denied any effective review by the MSPB's pococurante attitude. Thus, the MSPB system failed of its essential purpose, providing procedural protection to employees who are limited to the MSPB as the sole review of any adverse agency action. The usual course of judicial proceedings is to adequately review the decision below. The MSPB failed to do so.

Petitioner submits that this result is the normal course for MSPB review. One commentator has noted:

> One thing that has not much changed during 1986 has been the Board's approach towards personnel litigation. Basically the Board's philosophy has been that the wicked shall perish and the rest will spent [sic] their remaining years and life savings proving their innocence.
>
> * * *
>
> The Board acts like an appellate court rather than a trial court. The problem is that in our judicial system appellate courts defer to trial courts because the law and the jurists are neutral. Agencies that define and judge misconduct and poor performance and then defend (or prosecute) their actions before the Board are not neutral; the institution to which deference is given has committed its resources to ensuring the decision to impose discipline, once made, is supported and upheld. As a factfinder, the Board

> remains a minimum due process adjudicator. An appellant or attorney who enters a Board case expecting homespun justice by a friendly magistrate or arbitrator attempting to settle an employment dispute is in for a shock. Presiding officials are just starting to learn what settlement means. Responsibility for interpretation of discovery rules is still split between administrative law judges and presiding officials. Although Board regulations allow for discovery, its use is curtailed by very short time limits and by a remarkably strict interpretation of relevance. Written transcripts are avoided. The results are readily apparent in the statistics demonstrating, as usual, the extraordinarily lopsided rate of agency affirmation by the Board. The whole procedure is designed to ferret out the worst examples of abusive employment practices and leave the remaining agency decisions intact. No one, given a choice between labor arbitration and a Board appeal, would choose the Board. But because arbitration is too expensive for routine use by unions or unavailable to employees not working in units with collective bargaining contracts, the Board is the only game around for most federal employees.

Peter B. Brodie, A Guide to Merit Systems Protection Board Law and Practice, Preface at 1-2 (4th ed. 1987).

The MSPB determination that the Agency termination of Petitioner was supported by a preponderance of the evidence was arbitrary and capricious and an abuse of discretion. Thus, the MSPB's decision in *Durkan v. Department of Agriculture* constituted a substantial departure from the usual course of judicial proceedings and violated the purposes of the MSPB appeal system. Petitioner has been consistently denied any fair review of the Agency decision.

## II. THE FEDERAL CIRCUIT'S DECISION IN *DURKAN V. DEPARTMENT OF AGRICULTURE* DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BECAUSE THE RECORD AS A WHOLE IN *ANTHONY DURKAN V. DEPARTMENT OF AGRICULTURE*, MERIT SYSTEMS PROTECTION BOARD, DOCKET NO. BN 0752 8810002 (JULY 8, 1988) LACKED SUBSTANTIAL EVIDENCE SUPPORTING THE ADMINISTRATIVE JUDGE'S CONCLUSIONS AND THE ACTION OF THE MSPB IN UPHOLDING THE AGENCY TERMINATION OF PETITIONER WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION.

Under the Civil Service Reform Act, the Court of Appeals is required to "review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be – (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence . . . ." 5 U.S.C. § 7703(c). In practice this means that the Court must determine whether the contested decision complies with applicable statutes and regulations and whether it has a rational basis supported by substantial evidence from the record taken as a whole. The record must disclose such relevant evidence as might be accepted by a reasonable mind as adequate to support the conclusion reached. 5 C.F.R. § 1201.56(c)(2). *See, also, Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

In applying this standard to issues of credibility, the Court of Appeals has required petitioners to establish

that the testimony of witnesses before the MSPB is inherently improbable or discredited by undisputed evidence or physical fact. *Hanratty v. Department of Transportation*, 819 F.2d 286, 288 (Fed. Cir. 1987). The Court has consistently refused to overturn determinations of credibility based upon the presiding official's observance of the witness's demeanor.

As noted above, the ALJ did not rely on the witnesses' demeanor in assessing their credibility. Rather, her decision was based on several factors which should not form the basis for finding one witness more credible than another, while arbitrarily and capriciously disregarding the undisputed documentary evidence controverting Mr. White's testimony.

1. The Agency Determination Was Not Supported by Substantial Evidence Because Mr. White's Unsupported Testimony was Directly Contradicted by the Agency's Own Written Records and the MSPB's Credibility Determination was Arbitrary, Capricious and an Abuse of Discretion.

As Senior Circuit Judge Baldwin noted in his dissent from the Federal Circuit's affirmance of the MSPB decision:

> The administrative judge erroneously and summarily concluded that these inconsistencies were of no importance because the agency's *charges* were not specific as to when Durkan purportedly accepted monies from White. However, it is not the relationship to the charges which makes White's testimony inherently improbable. Rather, the fact that White definitively testified that he gave Durkan money at specific times on specific days in specific places, when the physical evidence shows that these events were almost impossible, serves to undermine his

> entire testimony. The casual dismissal of these discrepancies was unwarranted. White provided the only evidence which tended to prove Durkan's culpability, and his testimony is not credible. Given these facts, the record as a whole lacks substantial evidence supporting the administrative judge's conclusions. I would reverse the decision and reinstate Mr. Durkan to his position with backpay.

*Durkan v. Department of Agriculture*, Docket No. 88-3389, *supra*, pp. 2-3; App. 23 (Baldwin, J., dissenting)(emphasis original).

It is absurd to imagine that Petitioner would be offered money to look the other way by L.B. Darling Co. when he was not in a position to look at all. Yet the Administrative Judge accepted this conclusion despite contradictions in the Agency's employment records for Petitioner. The Federal Circuit likewise casually dismissed the undisputed evidence discrediting Mr. White's testimony in blatant disregard for the standard of review applied to MSPB credibility determinations.

In *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 566, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), this Court outlined the standards to be applied to determine whether a lower court's findings are clearly erroneous under Federal Rule of Civil Procedure 52(a). Similar to the determination of whether substantial evidence exists under 5 U.S.C. § 7703(c) and 5 C.F.R. § 1201.56(c)(1)[4], a finding is clearly

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[4] Substantial evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion even though other reasonable persons might disagree. *See* 5 C.F.R. § 1201.56(c)(1).

erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.[5] *Id.* at 573, 105 S.Ct. at 1511, 84 L.Ed.2d 518.

A finding is clearly erroneous in certain situations, even those findings regarding credibility.

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. *Documents or objective evidence may contradict the witness' story;* or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. *Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.*

*Id.* at 575, 105 S.Ct. at 1512, 84 L.Ed.2d 518 (citation omitted)(emphasis added).

Agency documents contradict the sole witness against Petitioner. Yet, at each level of review this fact is glossed over as if insignificant. Such blatant disregard of a recognized basis for overturning "credibility" determinations constitutes a departure from the usual course

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[5] Compare this standard also with the definition of 'preponderance of the evidence' applicable to MSPB review of agency decisions:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

*Hale*, 772 F.2d at 885, quoting 5 C.F.R. § 1201.56(c)(2).

of judicial proceedings and warrants review by this Court. This disregard for the usual course of judicial review is particularly egregious in this case because only one witness was presented. This witness is an admitted criminal and the Petitioner is a decorated Agency employee with an unblemished record for loyalty, dedication and honesty.

Other Circuit Courts applying this standard overturn lower court findings when contradicted by undisputed objective evidence in the record. *See, Plyler v. Evatt*, 846 F.2d 208, 214 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 241, 102 L.Ed.2d 230 (1988)(finding clearly erroneous where based on general statement when measured against contradictory objective evidence); *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1505 (4th Cir. 1986)("To the extent that the court's conclusion rests on its decision to disbelieve Harris-Teeter's witnesses, the objective evidence refutes it, and we are left with the definite impression that the trial court was mistaken.").

As stated in *Griffin v. City of Omaha*, 785 F.2d 620 (8th Cir. 1986):

> From our review of the record, we are left with the firm impression that the district court mistakenly concluded that neither Griffin nor McWhorter was subject to intentional discrimination on the basis of race. We are satisfied that Griffin met the applicable firearms standards. Further, with respect to McWhorter, we believe that the district court failed to consider important evidence and testimony, some of which contradicts evidence and testimony upon which the court premised its findings.

*Id.* at 626.

Further, the Federal Circuit Court of Appeals has recognized that unrebutted agency records in and of themselves constitute prima facie evidence. In *Hale, supra,* the petitioners were removed from positions as air traffic controllers based on charges of participating in an illegal nationwide strike. Discovery sanctions resulted in the Department of Transportation having to rely on documentary evidence in the form of watch schedules, personnel logs, and time and attendance records to prove its case. The petitioners did not testify on their own behalf but instead moved for a directed verdict at the close of the agency's case. *Id.* at 884.

While the presiding official found that the agency had not established its case by a preponderance of the evidence, the MSPB, upon review, held the preponderance of the evidence test had been met. *Id.* The Federal Circuit affirmed.

> The board noted that the T and A [time and attendance] reports clearly applied to the time in question, that they bore the signature of petitioners' supervisor, and that petitioners never challenged the authenticity of the reports. The reports themselves are self-explanatory, and demonstrate that petitioners were AWOL on August 3-6, 1981. Although this prima facie showing of petitioners' absence amounts to nothing more than a bare minimum of evidence, when such self-explanatory documentary evidence of petitioners' absence is unrebutted, the only conclusion that a reasonable mind can make is that the fact of petitioners' absence on the days in question is more likely true than not true.

*Id.* at 886.

Applying this rationale to the case at bar, it is readily apparent that Petitioner was not at the L.B. Darling Co.

for at least 5 of the 13 Fridays in question. Mr. White testified he paid Petitioner $300.00 each Friday from October to December of 1980. This "prima facie" evidence of Petitioner's absence nullifies Mr. White's testimony and, as no other evidence was offered in support of the Agency termination, requires reversal for lack of substantial evidence.

The MSPB system is supposed to afford protection to the employee who has no other route of review available for an adverse agency action. To accomplish this end, review is vested in the Federal Circuit Court of Appeals. However, the review fails of its essential purpose if it is limited to mere lip service to the applicable standards without more than a cursory glance at the record. The Federal Circuit departed from the usual course of judicial proceedings by this inadequate review, as demonstrated by the application of the "clearly erroneous" standard in other circuit courts leading to a contrary result.

> Although it mandated great deference to a district court's findings of fact, the Supreme Court in *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), articulated a standard of appellate review, not a standard that precludes review. Even a decision that relies upon an assessment of witness credibility may be reversed as 'clearly erroneous' when the witness's account viewed 'in light of the record in its entirety' is 'implausible on its face.'

*Beatty v. Chesapeake Center, Inc.*, 835 F.2d 71, 75-76 (4th Cir. 1987), quoting *Anderson*, 470 U.S. at 574, 105 S.Ct. at 1512 (citation omitted)(K.K. Hall, Circuit J., dissenting).

## CONCLUSION

Neither the MSPB nor the Court of Appeals gave any weight to the refutation of Mr. White's testimony, despite the lack of any extrinsic evidence in support of his testimony. Such an egregious disregard of the standards of judicial review can be viewed as no less than an abuse of discretion. Thus, both the MSPB and the Federal Circuit departed from the usual course of judicial proceedings, leaving Petitioner with no alternative but to seek recourse in this Court. Petitioner submits that the proceedings before the MSPB and the Federal Circuit contain the very obvious and exceptional error which requires review by this Court of their findings. *Berenyi v. Immigration Director*, 385 U.S. 630, 635, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967). Thus, Petitioner respectfully requests that this petition be GRANTED.

Respectfully submitted,

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

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| ANTHONY DURKAN,<br>Appellant,<br>v.<br>DEPARTMENT OF AGRICULTURE,<br>Agency. | ) | DOCKET NUMBER<br>BN07528810002<br><br>DATE: *JANUARY 13, 1988* |

*Francis X. Murray*, Esq., McNeil, Murray & Sorrell, Inc., Burlington, Vermont, for the appellant.

*Ann L. Nilsson*, Minneapolis, Minnesota, for the agency.

*BEFORE*

Rosemary E. Harvey
Administrative Judge

*INITIAL DECISION*

Appellant timely appealed his removal from the position of Food Inspector, GS-9, effective October 9, 1987. Appellant is entitled to appeal in accordance with 5 U.S.C. §§ 7511(a)(1)(A); 7513(d); and 7701. For the reasons below, the agency's action is AFFIRMED.

*ANALYSIS AND FINDINGS*

The agency removed appellant for acceptance of monies from an establishment whose operations are regulated by the Department. Specifically, the agency alleged that between October 5, 1980 and December 24, 1980

appellant, who was then assigned to perform federal meat inspection at the L.B. Darling Company, Southboro, Massachusetts, accepted $300 per week from the L.B. Darling Company in return for overlooking the company's action in adulterating meat destined for the federally-subsidized national school lunch program.

Record evidence shows that in September 1986 the vice-president of L.B. Darling Company and two federal meat inspectors were served with an 11-count Criminal Information charging them with participation in a fraud and bribery scheme, from at least 1978 to not later than October 7, 1985. The scheme involved the theft of over one million pounds of federally-donated ground beef intended for school lunch programs in several states. Appellant's name was mentioned in the 11-count Criminal Information as having received cash payments from L.B. Darling Company in return for being influenced in the performance of his official duties. The U.S. Attorney for the District of Massachusetts declined to criminally prosecute appellant.

*The agency presented the testimony of one witness to prove its allegations against appellant.*

Mr. David R. White, former supervisor of production and plant manager of L.B. Darling Company, testified that for a three-month period in the fall of 1980 he personally gave appellant $300 each week so that appellant would not enforce government regulations at the plant thereby allowing L.B. Darling Company to operate the way it wanted to operate. Mr. White stated that he gave this money to appellant at the direction of Mr. Kenneth Jacobson, vice-president and general manager of L.B.

Darling Company. Initially, according to Mr. White, appellant resisted taking the money but after a while he decided to accept it. Mr. White testified that appellant gave him back $100 each week. That $100 was then used by the two men for food and drink at a nearby restaurant, the Honolulu Restaurant. Mr. White said he gave the money to appellant on Fridays. He gave it to him either in the government office at the plant or at the Honolulu Restaurant.

Mr. White stated that he and appellant became friends while appellant worked at the plant. They were friends before Mr. White started giving appellant $300 per week. Mr. White said that he and appellant were closer than most brothers. They socialized together three, four, or even five times a week during the time appellant was on rotational assignment at the plant. In December 1985 appellant attended the wedding of Mr. White's daughter. Mr. White also acknowledged that in 1980 he lost his driver's license for one year for a drunk-driving conviction. Appellant drove him to work during the time he did not have his license.

Mr. White testified that the last conversation he had with appellant was when he called appellant on the telephone to tell him that the FBI was investigating the L.B. Darling Company. The newspapers had already printed some stories about the investigation. He told appellant that they were in trouble. Appellant wanted to know how bad it was. Mr. White told appellant that he thought it was bad.

Mr. White acknowledged receiving immunity from criminal prosecution in return for giving information

about the theft and bribery scheme to the prosecutors. He said that the way it was explained to him was that if he got immunity he had better tell the truth, because if he lied he was "gone."

*Appellant denied that he took any bribes from Mr. White.*

Appellant testified that he never took any money from Mr. White in exchange for not doing his job at the L.B. Darling Company. Appellant also testified that during the time period he allegedly received the $300 per week on Fridays, there were at least seven Fridays that he either was not working at the L.B. Darling Company or he would not have been socializing after work at the Honolulu Restaurant. He said that he and his wife along with his two children always celebrate their wedding anniversary, October 3, and the date they immigrated to this country from Ireland in 1962, October 22. When these two dates fall during the week, the family celebration always occurs on Friday of that same week. Furthermore, appellant noted that his time and attendance cards show that on five Fridays during November and December 1980 he worked at other locations distant from the L.B. Darling Company.

Appellant also noted that he had never received an unsatisfactory performance rating. On some evaluations his supervisors rated him as very honest with a high degree of integrity. He also received in 1981 a letter of commendation for his good performance.

*Appellant presented testimony as to his reputation for honesty.*

Appellant also presented three witnesses who testified to his reputation for truth and honesty. Mr. William Rocheleau, a food inspector with the agency, testified that he has known appellant for 16 years. He trained under appellant. On the several occasions he trained with appellant, appellant did his job to the utmost. Appellant knew what he was supposed to do and he did it. Mr. Rocheleau stated that, in his opinion, appellant enjoys an excellent reputation for truth and honesty. He does not believe that appellant is capable of accepting bribes.

Mr. Gordon Buswell, also a food inspector with the agency, testified that he has known appellant for approximately eight years. He has worked with appellant on various rotational assignments. He believes appellant does an outstanding job. In his opinion, appellant enjoys a good reputation for honesty and integrity within the community and with his fellow workers. Mr. Buswell said he could not conceive of appellant accepting money for not doing his job.

Mr. Donald Merchant, vice-president of McKenzie Packing, a meat processing plaint in Burlington, Vermont, testified that he has known appellant in his capacity as a meat inspector for four years. He said that appellant enjoys an excellent reputation for honesty and integrity within the community of local meat packers in the Burlington, Vermont area. Mr. Merchant does not believe appellant is capable of doing something dishonest. He said appellant is a firm but fair meat inspector.

*Appellant contended that Mr. White was not credible.*

Appellant argued that Mr. White's testimony is not credible. He noted that Mr. White has a criminal record, i.e., he was convicted of driving while under the influence of alcohol. Appellant alleged that Mr. White was motivated to give evidence about bribing federal food inspectors in return for immunity from criminal prosecution. Appellant suggested that Mr. White kept the money that he said he was paying to appellant. Appellant argued that Mr. White implicated appellant in the bribery scheme because Mr. White had to account for the money he kept instead of paying off the federal meat inspectors.

In addition, appellant argued that Mr. White gave inconsistent statements in the two interviews he had with Mr. John Jones, Special Agent with the Office of Inspector General. The agency submitted a copy of the written statement signed by Mr. White on April 3, 1987 after his second interview with Mr. Jones. *See* Appeal File, Agency Record, Tab 5-4L. Mr. Jones testified that in the first interview Mr. White told him that as L.B. Darling got more involved in the school lunch program appellant received more than $300 per week. Mr. White estimated that appellant received from $300 to $600 per week. However, on April 3, 1987 before he signed his written statement, Mr. White crossed out the portion about giving appellant $300 to $600 per week and wrote in that appellant always received the same amount of money, $300 per week. Appellant also noted that nowhere in Mr. White's written statement does it state that appellant gave him back $100 per week.

Further, Mr. Jones testified that Mr. White first told him that appellant received $300 each week until he was transferred in 1980 or 1981. Before Mr. White signed his statement he crossed out that sentence.

*Factors to be considered when assessing credibility.*

The resolution of this case turns on credibility, i.e., whether Mr. White's testimony or appellant's testimony is believable. To resolve credibility issues, I must: 1) identify the factual questions in dispute; 2) summarize all of the evidence on each disputed question of fact; 3) state which version I believe; and 4) explain in detail why the version I chose is more credible than the other version. Factors to be considered when a credibility issue is involved include: 1) the witness's opportunity and capacity to observe the event in question; 2) the witness's character; 3) any prior inconsistent statement by the witness; 4) a witness's bias or lack of bias; 5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; 6) the inherent improbability of the witness's version of events; and 7) the witness's demeanor. *See Hillen v. Department of the Army*, M.S.P.B. Docket No. DC07528510324-1 (Nov. 23, 1987).

*Mr. White's version of events is more credible than appellant's.*

I find that Mr. White's version of events is more credible than appellant's. I base this finding on several factors. Firstly, there is no dispute that bribery occurred at the L.B. Darling Company as the vice-president of the company and one federal meat inspector pled guilty to

the charges. Mr. White provided the testimony that led to these indictments and guilty pleas.

Secondly, I can discern no legitimate motive for Mr. White to falsify appellant's involvement in the bribery scheme. I find implausible appellant's suggestion that Mr. White falsely implicated him to avoid a charge of embezzlement because of the money Mr. White kept himself. Mr. White was given immunity from criminal prosecution. He testified that he knew he had to tell the truth if given immunity or else he would suffer serious consequences. In fact, given the closeness of the relationship between him and appellant, which appellant did not dispute, I find that Mr. White would be motivated to spare appellant from any possible criminal charges if Mr. White were able to do so. If Mr. White had to account for money that he kept himself, he could have told the FBI that the other two inspectors were given all of the bribery money and, thus, he could have protected appellant.

Thirdly, appellant did not dispute that Mr. White telephoned him and told him that the FBI was investigating L.B. Darling Company and that they were in trouble. Nor did appellant dispute that it was the last conversation he and Mr. White had together. The implication of the conversation is obvious, i.e., Mr. White was warning appellant that both of them could be in trouble. I find that appellant demonstrated he knew what Mr. White was talking about when he asked Mr. White how bad it was. Mr. White's action in warning his friend of possible trouble tends to show that appellant was involved in the bribery scheme.

If Mr. White were going to fabricate appellant's involvement in the scheme, I find that he would not have telephoned appellant. On the other hand, if appellant had not been involved in the bribery scheme and Mr. White was simply calling a good friend to discuss with the friend that he (Mr. White) could be in trouble with the FBI, I can find no reason why their friendship would suddenly come to an end after the telephone call. Appellant did not dispute Mr. White's testimony that the two men are no longer friends. The fact that the friendship did come to an end tends to show, I find, that appellant was involved in the bribery scheme.

*The opportunity and capacity to observe the event.*

This factor is relatively unimportant to the resolution of the credibility issue in this case because there were only two people, Mr. White and appellant, who were eyewitnesses to the alleged event of Mr. White giving appellant money. Furthermore, whether the event actually took place is the important factor here and not what witnesses observed happening during the event.

*Character.*

I do not find that Mr. White's conviction for drunk driving diminishes his credibility because the conviction is not for an action reflecting on his honesty or truthfulness.

Appellant's reputation for honesty and integrity with his co-workers and with personnel in the meat-packing industry does not, I find, outweigh the absence of any

legitimate reason for Mr. White to fabricate appellant's involvement in the bribery scheme. I do not find appellant's reputation to be dispositive of the issue in this case.

*Prior inconsistent statement.*

I do not find that Mr. White made inconsistent statements diminishing his credibility. The record reflects that Mr. White signed only one written statement after his interviews with Mr. Jones. The fact that Mr. White made corrections before he signed what Mr. Jones had prepared after their first interview demonstrates to me that Mr. White was trying to be accurate and truthful and not that he made inconsistent statements.

There is no evidence that appellant made any inconsistent statements.

*Bias.*

Concerning bias, as I have indicated above, I do not find that Mr. White had a motive to fabricate appellant's involvement in the bribery scheme. If anything, given their friendship, Mr. White would be motivated to protect appellant. Other than appellant's denial of taking bribes, Mr. White's testimony was not contradicted. Nor is Mr. White's testimony inconsistent with other evidence.

On the other hand, appellant had a motive to deny his involvement in the bribery scheme, i.e., to save his job.

*Contradiction by or consistency with other evidence.*

Consideration of this factor does not help resolve the credibility issue because the only contradiction in evidence is Mr. White's and appellant's contradiction of each other's testimonies. I do not find that appellant's testimony and documentary evidence showing that he was not at L.B. Darling on every Friday between October 1, 1980 and the end of December 1980, contradicting Mr. White's testimony that he paid appellant on Fridays during those months, is conclusive on the issue of whether appellant accepted the bribes. The agency did not charge that appellant accepted a specific amount of money nor that he accepted money on every Friday in October, November, and December 1980. The fact that appellant may not have been at L.B. Darling on five Fridays during those months and that he did not socialize with Mr. White after work on at least two other Fridays during that time period does not show that he did not accept bribes on the other Fridays he was at L.B. Darling.

*Inherent improbability.*

Again, I find this factor to be relatively unimportant in resolving the credibility issue involved in this case. There is nothing inherently improbable in either Mr. White's or appellant's testimony.

*Demeanor.*

I found nothing in either witness's demeanor that helped me a great deal in resolving the credibility issue. Both witnesses testified in a straightforward manner and

looked me straight in the eye when they testified. I found nothing in their facial expression or general manner that indicated that one was being untruthful. Neither witness was nervous or appeared that he was trying to hide anything.

*The agency has proven its charge against appellant.*

Based upon a consideration of all of the factors outlined in *Hillen* and based upon my failure to find any reason why Mr. White would lie about his friend's involvement in the bribery scheme, I find that appellant did accept monies from an establishment whose operations are regulated by the agency as charged. I find that the agency has proven by a preponderance of the evidence its charge against appellant and I sustain it.

*Removal is an appropriate penalty.*

The agency introduced an affidavit dated December 8, 1987 from the deciding official, Mr. John A. Mehl, Assistant Personnel Officer. Mr. Mehl stated that in making the decision to remove appellant he considered appellant's 19 years of service with no prior disciplinary record. He also considered appellant's past performance history including the special commendation he had received. Mr. Mehl considered the length of time between the misconduct and the adverse action. However, these considerations did not outweigh the seriousness of the misconduct in his view.

Appellant's misconduct means that his honesty and integrity have been brought into question. The agency

has lost confidence in appellant and can no longer trust him. The reputation of the agency and the professionalism of the food inspection force has been seriously compromised. The penalty of removal was chosen in order to help restore public confidence and respect in the agency and to demonstrate to other agency employees that misconduct involving honesty and integrity will not be tolerated. Mr. Mehl stated that a penalty less than removal was not considered just nor would it have been consistent with past agency practice.

Appellant's misconduct in accepting money in exchange for not enforcing government regulations at the L.B. Darling Company relates directly to his integrity and constitutes a failure to be trustworthy and honest. It goes to the very purpose of his position as a federal meat inspector. The seriousness of appellant's misconduct outweighs his 19 years of service and his good performance record. After consideration of all of the above, I find that the agency's choice of removal as a penalty is within the tolerable limits of reasonableness and is not arbitrary or capricious. *See Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 302 (1981).

*Appellant alleged that the agency erred by bringing stale charges.*

Appellant alleged that the agency made a fatal error in not proposing his removal as soon as it knew about his alleged involvement in the bribery scheme. Appellant argued that the agency knew as early as the fall of 1985, i.e., as soon as the FBI and Mr. Jones began investigating at the L.B. Darling Company, that appellant was implicated in the scheme.

The agency argued that it could not bring any adverse action against appellant until the U.S. Attorney's Office had decided whether to prosecute. The agency argued that the Office of Inspector General was not free to release its report to the agency's personnel office to begin administrative action until January 5, 1987.

Appellant testified that if he had been charged with the offense in 1985 he might have had a better recollection of the specifics involved in the events in question.

I find it unnecessary to decide if the agency knew about appellant's involvement in the fall of 1985 or if it were free to begin action against appellant before January 1987. I find that appellant has not made the requisite showing that any delay in bringing the charges against him caused him "demonstrable prejudice". *See Affsa v. Department of Agriculture*, 7 M.S.P.R. 446, 451 (1981). The issue in this case is whether appellant accepted a bribe. Such a fact is not easily forgotten. The record does not reveal that there were any special circumstances or details surrounding the paying of the bribe that could be forgotten through the passage of time. I have found above that appellant's absence from the L.B. Darling Company on several Fridays during the fall of 1980 is not dispositive of the issue of whether he accepted a bribe. Nor do I find that appellant has shown that there were other necessary witnesses whose presence could not be obtained because of the passage of time. *See Affsa* at 451.

Therefore, on the basis of all of the above, I find no merit to appellant's allegation that the agency made a fatal error in not bringing the charges against him until July 1987.

*DECISION*

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Rosemary E. Harvey
Rosemary E. Harvey
Administrative Judge

**NOTICE TO APPELLANT**

This initial decision will become final on February 17, 1988 unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

*BOARD REVIEW*

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If

you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

*JUDICIAL REVIEW*

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

**NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

*CERTIFICATE OF SERVICE*

I certify that the attached document(s) was sent by regular mail this day to each of the following:

*Appellant*

Mr. Anthony Durkan
18 Elm Street
Winooski, Vermont 05404

*Appellant's Representative*

Francis X. Murray, Esq.
McNeil, Murray & Sorrell, Inc.
271 South Street
Burlington, Vermont 05401

*Agency's Designated Representative*

Ann L. Nilsson
USDA, Food Safety Inspection Service
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100 North 6th Street
Minneapolis, Minnesota 55403

*Other*

Mr. Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W.
Room 7635
Washington, D.C. 20415

January 13, 1988
(Date)

/s/ Frances Silver
Frances Silver
Legal Technician

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| ANTHONY DURKAN,<br>Appellant,<br>v.<br>DEPARTMENT OF AGRICULTURE,<br>Agency. | ) | DOCKET NUMBER<br>BN07528810002<br><br>DATE: JUL 8 1988 |

*Francis X. Murray*, Esquire, McNeil, Murray & Sorrell, Inc., Burlington, Vermont, for the appellant.

*Lawrence S. Cavallaro*, Washington, D.C., for the agency.

*BEFORE*

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

*ORDER*

After consideration, the Board DENIES the appellant's petition for review of the initial decision issued on January 13, 1988, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

*NOTICE TO APPELLANT*

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction.

*See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3389

ANTHONY DURKAN,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

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DECIDED: April 4, 1989

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Before RICH, *Circuit Judge*, BALDWIN, *Senior Circuit Judge*, and ARCHER, *Circuit Judge*.

PER CURIAM.

DECISION

Petitioner, Anthony Durkan (Durkan), seeks review of the decision of the Merit Systems Protection Board, Docket No. BN07528810002 (July 8, 1988), sustaining his removal from the position of Food Inspector, Department of Agriculture. We *affirm*.

## OPINION

Durkan's challenge is to the administrative judge's (AJ) determination that the testimony of the agency's witness, David R. White, was more credible than his own. As stated by the AJ, "[t]he resolution of this case turn[ed] on credibility, i.e., whether Mr. White's testimony or appellant's testimony is believable."

When reviewing credibility determinations of the trier of fact, our standard of review is extremely limited. *Hambsch v. Department of the Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986) ("virtually unreviewable"). This court will not overturn a credibility determination unless it is shown to be based on testimony that is "inherently improbable or discredited by undisputed evidence or physical fact." *Hanratty v. Department of Transp.*, 819 F.2d 286, 288 (Fed. Cir. 1987) (quoting *Hagmeyer v. Department of the Treasury*, 757 F.2d 1281, 1284 (Fed. Cir. 1985)). After carefully considering Durkan's arguments and the AJ's thorough analysis of the evidence, we are not persuaded that the credibility determination of the AJ should be disturbed.

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**United States Court of Appeals**
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BALDWIN, *Senior Circuit Judge*, dissenting.

I agree with the majority that the critical issue in this case is witness credibility. However, because of the significant physical evidence contrary to the testimony of David White, and the numerous inconsistencies in that testimony, I would reverse the board's decision. White's testimony is "inherently improbable [and was] discredited by undisputed evidence [and] physical fact." *Hagmeyer* v. *Department of the Treasury*, 757 F.2d 1281, 1284 (Fed. Cir. 1985). These inconsistencies include essential facts such as dates, times and locations as well as the dollar amounts White purportedly paid Durkan to look the other way while his company violated federal law.

Anthony Durkan was a trusted and reliable employee of the Department of Agriculture ("Agency") for 19 years. Durkan's hard work had been recognized through Agency commendation and witnesses testified to his diligence and trustworthiness. White was the only witness to testify against Durkan, and did so pursuant to a plea agreement granting him freedom from prosecution as an alleged co-conspirator.

The agency was unable to provide any evidence which corroborated White's accusations of illicit pay-

ments. On the other hand Durkan's work records place him at locations different from where White claims he was on at least seven occasions when White asserts he paid Durkan bribes. Most notable among the discrepancies is the fact that Durkan was working at another location when White says he was at the Darling plant in Southboro. Durkan's absence from the Darling plant at numerous times when he was purportedly receiving illegal payments from White is shown by written, uncontested records. Nonetheless, the administrative judge found these inconsistencies between these written records and White's testimony "irrelevant".

The administrative judge erroneously and summarily concluded that these inconsistencies were of no importance because the agency's *charges* were not specific as to when Durkan purportedly accepted monies from White. However, it is not the relationship to the charges which makes White's testimony inherently improbable. Rather, the fact that White definitively testified that he gave Durkan money at specific times on specific days in specific places, when the physical evidence shows that these events were almost impossible, serves to undermine his entire testimony. The casual dismissal of these discrepancies was unwarranted. White provided the only evidence which tended to prove Durkan's culpability, and his testimony is not credible. Given these facts, the record as a whole lacks substantial evidence supporting the administrative judge's conclusions. I would reverse the decision and reinstate Mr. Durkan to his position with back pay.